IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 26

THE LEITER MINERALS, INC.,

Petitioner,

versus

UNITED STATES OF AMERICA, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF FOR THE PETITIONER.

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OPINIONS BELOW.

The opinion of the District Court (R. 152-163) is reported at 127 F. Supp. 439. The opinion of the Court of Appeals (R. 176-181) is reported at 224 F. (2d) 381.

JURISDICTION.

The judgment of the Court of Appeals was entered on June 30, 1955 (R. 181), and a petition for rehearing was denied on October 14, 1955 (R. 181). The petition for a writ of certiorari was filed January 9, 1956, and was granted February 27, 1956. The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED.

Whether the Federal Court, despite the congressional rule of comity, 28 U. S. C. 2283, which makes no exception in favor of the United States Government, and in direct transgression of the long established judicial rule of comity in such cases, may enjoin a previously filed and pending *in rem* action in a state court of coordinate jurisdiction; or whether, as petitioner contends, the subsequently filed *in rem* action in Federal Court must be dismissed or abated, or at least stayed, pending the determination of the State Court suit.

This question involves consideration of the subsidiary questions of (1) whether the United States District Court has exclusive jurisdiction to determine the title of the United States to real property; or (2) as petitioner contends, whether the United States may be required under the circumstances to intervene as a plaintiff in the previously instituted *in rem* suit pending in the state court.

There is further incidentally involved the question whether the Federal Court, in connection with the *in rem* action subsequently filed there, is authorized to enjoin the previously filed *in rem* state court suit upon making the

claim that the state court is without jurisdiction; or whether, as petitioner contends, such a question is for the state court initially to determine, subject to the power of ultimate review by this Court.

STATUTES INVOLVED.

Title 28, U. S. C., Section 2283 is the present congressional limitation upon the power of the Federal Courts to enjoin State Court proceedings: This Statute reads:

> "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments. June 25, 1948, c. 646, 62 Stat. 968."[1]

The procedural basis for petitioner's previously filed State Court real action, now temporarily enjoined by the Court below, is Article 43 of the Louisiana Code of Practice, reading as follows:

> "43. *Parties defendant—Lessee's duty to declare name of lessor.*—The petitory action, or one by which real property, or any immovable right to such property may be subjected, is claimed, *must be brought* against the person who is in the actual

[1] In footnote 1 in the petition for certiorari filed herein it was acknowledged that the "great weight of lower court authority" was to the effect that the prohibition of Section 2283 did not apply to the United States. This is true, but as we shall point out in this brief, the Lower Court decisions are erroneous when the more recent decisions of this Court (see, e. g., **Amalgamated C. W. of America v. Richman Bros.**, 348 U. S. 511, 99 L. Ed. 600 (1955)) are considered.

possession of the immovable, even if the person having the possession be only the farmer or lessee.

"But if the farmer or lessee of a real estate be sued for that cause of action he must declare to the plaintiff the name, and the residence of his lessor, who shall be made a party to the suit, if he reside in the State, or is represented therein, and who must defend it in the place of the tenant, who shall be discharged from the suit."[2]

There is also involved Article 392 of the Louisiana Code of Practice, reading as follows:

"392. *Court in which intervention had.*— The plaintiff in intervention must institute his demand before the court in which the principal action has been brought; *being considered as plaintiff*, he must follow the jurisdiction of the defendant."[3]

Finally, there is indirectly involved consideration of Act 315 of the 1940 Louisiana Legislature (Louisiana Revised Statutes 9:5806), since it is upon this 1940 Louisiana Act that petitioner's claim on the merits to the minerals involved in the two *in rem* suits is based. This 1940 Louisiana Act is printed, *infra*, p. 37 and also in Appendix A, *infra*, p. 45.

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[2] All emphasis by petitioner unless otherwise noted.

[3] Article 392, and the settled Louisiana jurisprudence thereunder, constitute one of the bases of petitioner's contention that to require the United States to intervene in the pending and previously filed State Court real action would not make the United States a party defendant, being sued without its consent (See, infra, p. 28).

STATEMENT.

Petitioner filed its State Court petitory action (R. 101-111)[4] in the Twenty-fifth Judicial District Court in and for Plaquemines Parish, Louisiana, on August 13, 1953, asserting title to and the right to possession of the minerals under a large tract of land located in that Parish. The petitory action is one of the recognized types of real action in Louisiana. See *Article 43, Louisiana Code of Practice, supra*, p. 3. It is only the minerals (or mineral rights) under the land in Plaquemines Parish which are involved in the State Court action, as well as in this, the subsequently filed, Federal Court suit. In Louisiana the minerals (or mineral rights) involved in both suits constitute immovable or real property. *Shaw v. Watson*, 151 La. 893, 92 So. 375 (1922). Under Louisiana law oil and gas in place are not subject to ownership, as specific things apart from the soil which they underlie; and since in Louisiana there can be no mineral estate in oil and gas as such, the sale or reservation of minerals is merely a grant or retention of right to go on land for exploration or exploitation of minerals, constituting a real right in the nature of a servitude or easement, which in turn prescribes, or expires by limitation, in ten years if not used.[5]

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[4] The Leiter Minerals, Inc., v. The California Company, et al., No. 3282, Plaquemines Parish, Louisiana.

[5] This has been the settled law of Louisiana since the 1922 decision of **Frost-Johnson Lumber Co. v. Salling's Heirs, et al.**, 150 La. 756, 91 So. 207. On the merits of the present title controversy, in both the State and Federal Court cases, the fundamental question involved is whether the 1938 mineral reservation in the sale to the United States by petitioner's predecessor in title was made "imprescriptible" by Louisiana Act 315 of 1940 (printed p. 37, **infra**, and also in Appendix A, **infra**, p. 45).

Petitioner's State Court action, as *expressly required* by the Louisiana Code of Practice, was brought against The California Company, the operator under subleases from Allen J. Lobrano, and against Lobrano as holder of leases granted to him by the United States. The State Court action was properly brought against these parties, as the State Judge, District Judge Bruce Nunez, ultimately held prior to the time that petitioner was restrained from proceeding in the State Court suit. (See decision of Judge Nunez, R. 145-149, and authorities therein cited).

After an unsuccessful attempt[6] had been made by The California Company and Lobrano to remove petitioner's State Court action to the United States District Court for the Eastern District of Louisiana, they filed various exceptions (R. 143-144), challenging the jurisdiction of the Plaquemines Parish Court; further urging that there was the absence of an indispensable party in the State Court action (viz., the United States); and finally pleading that the State Court petition disclosed no cause or right of action (which last exceptions in Louisiana are similar to a general demurrer).

In due course all of the exceptions in the State Court suit were presented to the State District Court on oral argument and briefs, and on March 23, 1954, Judge Nunez overruled all of the exceptions, handing down written reasons (R. 145-149).

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[6] In ordering the action remanded to the State Court District Judge J. Skelly Wright noted: "A federal question may be 'lurking in the background' in this case, but its presence is not sufficiently disclosed by plaintiff's petition, nor is the question, if present, a substantial one."

On March 17, 1954, shortly before the State District Judge ruled upon the exceptions filed in the State Court proceeding, the present action (R. 1-20) was commenced by the United States in the Federal Court for the Eastern District of Louisiana. The present action, which is one to quiet the title of the United States to the same mineral rights which are made the subject of the suit in the State Court, was, therefore, filed over seven months after the commencement of the State Court suit, and after issue had been joined by the defendants in the State Court.

Coupled with the prayer of the United States in the present action to have its title quieted, and to have the alleged "clouds" upon its alleged title cancelled and removed, is the prayer that petitioner be enjoined from claiming any further interest in the property, and particularly that petitioner be enjoined from prosecuting the State Court suit (R. 16-17). On April 3rd, 1954, the United States filed a motion for a temporary restraining order to restrain petitioner from prosecuting the State Court action (R. 18-20), which restraining order had been granted by the District Judge the previous day (R. 22, 23).

The complaint in the Federal Court suit was met by petitioner's motion to dismiss or abate, or, alternatively, for a stay of, the subsequently filed Federal action (R. 25, 26). Petitioner's motion was based upon the pendency of the petitory action previously brought by petitioner in the Louisiana State Court, and upon the familiar rule that where two actions are pending in courts of co-

ordinate jurisdictions, and where the two actions are *in rem*, or *quasi in rem*, the Court which is subsequently resorted to is disabled from exercising any power over the property in litigation, or from interfering with the already pending litigation itself. Alternatively, petitioner's motion was to stay the Federal Court suit for the additional reason that the State Court litigation involved questions of State law which should be first determined by the State Courts, in that the said determination would provide a rule of decision in the Federal Court and further might render a decision of Federal constitutional questions unnecessary. Petitioner's motion concluded (R. 26) by moving for the dissolution of the restraining order and for a denial of the requested preliminary injunction for the additional reason that such injunctive relief must be denied, plaintiff under the provisions of Title 28 U. S. C. A., Section 2283.

The District Court overruled petitioner's motions (R. 152-163), and proceeded at the same time to enter the temporary injunction prayed for by the United States; and on petitioner's appeal[7] the Court of Appeals for the Fifth Circuit affirmed (R. 176-180).

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[7] Although the right of appeal from the District Court's interlocutory order of injunction is expressly conferred by Title 28, U. S. C. 1292, only in respect of the injunctive feature of the order, the appellate jurisdiction also embraces that portion of the order which overruled petitioner's motion to dismiss or abate, inasmuch as the said motion is basic to and underlies the injunctive order itself. **Deckert v. Independence Shares Corp.**, 311 U. S. 282, 85 L. Ed. 189 (1940).

SUMMARY OF ARGUMENT.

I. The injunction issued by the Court below against petitioner's pending State Court *in rem* suit is prohibited by the anti-injunction statute, 28 U. S. C. 2283. No exception in favor of the United States is included in Section 2283 and there exists in its favor no other congressional exception to the clear-cut ban on Federal injunctions against State Court proceedings. No judicial departure from the anti-injunction statute is countenanced. *Toucey v. New York Life Ins. Co.*, 314 U. S. 118. Even where the Federal Court complaint for injunctive relief alleges utter want of jurisdiction in the State Court sought to be enjoined, the anti-injunction statute prohibits enjoining the State proceeding. *Amalgamated C. W. of A. v. Richman Bros.*, 348 U. S. 511. The present injunction cannot be justified on the ground that it is in aid of the Lower Court's jurisdiction, for such an argument would be contrary to the purpose of the 1948 revision of the anti-injunction statute. The phrase in 28 U. S. C. 2283 allowing Federal Court injunctions against State Court suits when "in aid of its jurisdiction" was included in the statute to protect the Federal Courts' removal jurisdiction. The anti-injunction statute is especially applicable where an injunction is sought by the United States as a party, for necessarily the conflict of State and Federal jurisdiction, which gave rise to the anti-injunction statute, is aggravated where the Government as plaintiff seeks to enjoin a coordinate State Court.

II. Even more fundamentally, the Federal Court *in rem* action which was filed seven months after petitioner's State Court *in rem* suit must be dismissed or abated. Petitioner's petitory action in the State Court,

and this subsequently filed action to quiet title to the identical property in the Federal Court are each *in rem* actions, as the courts below tacitly conceded. Of necessity two *in rem* actions can not proceed concurrently. Therefore, the Federal Court is disabled from exercising any power over the same *res* which is involved in the State Court suit, by injunction or otherwise. *Hagan v. Lucas*, 10 Pet. 400 (1836); *Toucey v. New York Life Ins. Co.*, 314 U. S. 118. This priority of jurisdiction rule is not only applicable to cases where the *res* is actually *in custodia legis*, but applies as well where to give effect to its jurisdiction or to effectuate its decree the Court must control the property. *Lion Bonding & S. Co. v. Karatz*, 262 U. S. 77. The rule of the *res* cases is fully applicable to the United States. *United States v. Bank of New York & Trust Co.*, 296 U. S. 463. The Federal Court does not have exclusive jurisdiction of a title claim of the United States. *United States v. Bank of New York & Trust Co.*, 296 U. S. 463. The State Courts, equally with the Federal Courts, have the inherent power concurrently to adjudicate upon Federal claims and Federal jurisdiction, subject to ultimate review by this Court. *United States v. Bank of New York & Trust Co.*, 296 U. S. 463; *Amalgamated C. W. of A. v. Richman Bros.*, 348 U. S. 511. Nor does the principle of sovereign immunity justify interference with petitioner's previously filed real action. The Government may intervene in the State proceeding as plaintiff with no sacrifice of its sovereign dignity or rights, *United States v. Bank of New York & Trust Co., supra;* and under Louisiana practice an intervention by the Government in petitioner's State Court action would not

cause the Government to become a defendant being sued without its consent. Louisiana Code of Practice, Art. 392; *State, ex rel. Pope v. Bunkie Coca-Cola Bottling Co.*, 222 La. 603, 63 So. (2d) 13.

III. In any event, the Court should grant petitioner's alternative motion to stay based on the "doctrine of abstention". On the merits the title controversy over the minerals in both the Federal and State suits will turn upon an interpretation of Louisiana Act 315 of 1940. This 1940 Louisiana Act has not yet been tested by the Louisiana Supreme Court against a claim that it violates the Federal Constitution. Such an issue would be squarely presented in petitioner's presently enjoined State Court action. This Court will not permit the Federal Courts to reach for such constitutional questions in the absence of a definitive determination of the local law by the State Courts. *Railroad Commission of Texas v. Pullman Co.*, 312 U. S. 496; *Hillsborough Township v. Cromwell*, 326 U. S. 620. It is an established principle that the local land law of a State is supreme, and the rights and interests of the United States may be made subject to State rules of property. *United States v. Fox*, 94 U. S. 315. On the merits in petitioner's State Court suit the question of the supremacy of power of the State law of property as against a Federal constitutional attack will emerge, although the Louisiana Supreme Court's decision may render unnecessary a determination of such constitutional questions. In the absence of an authoritative State Court decision interpreting the 1940 Louisiana Act, the Federal Courts should abstain from exercising jurisdiction in this case.

ARGUMENT.

I.

28 U. S. C. 2283 IS APPLICABLE TO THE UNITED STATES AND PROHIBITS THE INJUNCTION ISSUED IN THIS CASE.

For convenience we again quote 28 U. S. C., 2283:[8]

> "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments. June 25, 1948, c. 646, 62 Stat. 968."

The recent expression of this Court in *Amalgamated C. W. of A. v. Richman Bros.*, 348 U. S. 511, 99 L. Ed. 600 (1955), is convincing that Section 2283 is applicable to the United States, and forbade the District Court from enjoining petitioner's State Court action in Plaquemines Parish.

The better light which the *Richman* case has cast upon Section 2283, as well as upon its progenitor statutes, makes it petitioner's duty to present preliminarily this question to the Court, although, as has been already noted, petitioner heretofore seemingly has yielded to the earlier Lower Court decisions holding that the previous anti-injunction statutes did not apply to suits brought by the Government. Nevertheless, petitioner did not abandon

[8] Based upon Title 28 U. S. C., 1940 Edition, Sect. 379 (Mar. 3, 1911, c. 231, Sect. 265, 36 Stat. 1162 [derived from R. S. Sect. 720]).

this point, and the petition for certiorari, particularly when considered with the brief in opposition,[9] fairly raises for consideration here the question now discussed.

The 1955 decision in *Amalgamated C. W. of A. v. Richman Bros.*, 348 U. S. 511, makes it clear that this Court will not sanction any departure from the clear-cut prohibition of 28 U. S. C. 2283 unless justified "by specifically defined exceptions". The *Richman* case was decided only recently, but the essential facts leading to the decision in the case may bear repeating: Petitioner, an unincorporated association of clothing workers, was sued in an Ohio State Court by Richman Brothers for temporary and permanent injunctions levelled at the union's peaceful picketing. After an unsuccessful attempt by the union to remove the case to the Federal Court the union applied to the Federal District Court for an injunction to compel Richman Brothers to withdraw the State Court action. Although this Court expressly assumed that the conduct in controversy was fully subject to the Taft-Hartley Act, and

[9] In its brief in opposition, the United States undertook at some length (brief in opposition, pp. 9-11) to show that the prohibition of Section 2283 did not apply to the present injunction against the State Court proceeding, and cited a number of Lower Court authorities so holding, namely, **United States v. McIntosh**, 57 F. (2d) 573 (E. D. Va., 1932); **United States v. Cain**, 72 F. Supp. 897 (W. D. Mich., 1947); **United States v. Phillips**, 33 F. Supp. 261 (N. D. Okla., 1940); **Brown v. Wright**, 137 F. (2d) 484 (C. A., 4th, 1943); **United States v. Taylor's Oak Ridge Corp.**, 89 F. Supp. 28 (E. D. Tenn., 1950); **United States v. Prince William County**, 9 F. Supp. 219 (E. D. Va., 1934), affirmed 79 F. (2d) 1007 (C. A., 4th), cert. den., 297 U. S. 714, (1936); **United States v. Inaba**, 291 Fed. 416 (E. D. Wash., 1923). To these may be added the additional Lower Court cases of **United States v. Babcock**, 6 F. (2d) 160 (D. C. Ind., 1925), affirmed **Babcock v. United States**, 9 F. (2d) 905 (C. C. A., 7th, 1925); **United States v. Dewar**, 18 F. Supp. 981 (D. C. Nev., 1937); **United States v. Western Fruit Growers**, 34 F. Supp. 794 (D. C. Cal., 1940), affirmed **Western Fruit Growers v. United States**, 124 F. (2d) 381 (C. C. A., 9th, 1941).

that, therefore, the State Court was without jurisdiction to decide upon the subject matter in the State Court litigation, it was held that an injunction by the Federal Court was prohibited by 28 U. S. C. 2283, and that the Federal questions—including the alleged utter want of jurisdiction in the State Court—would be left for State Court decision, subject to ultimate review by this Court. Said Your Honors in the *Richman* case:[10]

> "In the face of this carefully considered enactment, we cannot accept the argument of petitioner and the Board, as amicus curiae, that Section 2283 does not apply whenever the moving party in the District Court alleges that the state court is 'wholly without jurisdiction over the subject matter, having invaded a field pre-empted by Congress.' No such exception had been established by judicial decision under former Sect. 265. In any event, Congress has left no justification for its recognition now. This is not a statute conveying a broad general policy for appropriate ad hoc application. Legislative policy is here expressed in a clear-cut prohibition qualified only by specifically defined exceptions."

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[10] **The Richman case, which was decided over two months after the present case was submitted to the Court of Appeals, was not discovered by petitioner prior to the filing of the petition for certiorari in this case. Such circumscribed research for a petition for certiorari has recently received implicit approbation by Mr. Justice Frankfurter in Carter v. United States, ... U. S. ....., 100 L. Ed. ..... (Adv. pp. 35, 36), where he said: "And counsel may be appropriately reminded that the requirements of the Rules of this Court regarding the contents of a petition for certiorari seldom call for the kind of research which may be demanded for a brief on the merits."**

It is true that the majority opinion in the *Richman* case undertook to demonstrate that the union was not the proper party plaintiff to institute the suit for an injunction. However, the dissenting opinions leave little doubt that apart from the limitations of 28 U. S. C. 2283 the District Court had jurisdiction of the union's complaint under 28 U. S. C. 1337.

The historical background of 28 U. S. C. 2283 has been so fully covered by the 1941 decision in *Toucey v. New York Life Ins. Co.*, 314 U. S. 118, 86 L. Ed. 100, that it would be tedious to repeat what was there said. See also Taylor and Willis, *The Power of Federal Courts to Enjoin Proceedings in State Courts*, 42 Yale L. J., p. 1169. It is sufficient here to say that the *Toucey* and *Richman* decisions unqualifiedly stand for the proposition that short of a statutory exception to the proscription of 28 U. S. C. 2283, no departure from 2283 will be allowed, save in one instance only.[11]

Respondents can not point to any "express" authorization by Congress to justify the injunction in the present case, and the "judicial exception" which the Lower Court decisions already referred to have interpolated in favor of the Government was an unauthorized straying

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[11] This is the rule of the res cases, which of course is the fundamental principle invoked by petitioner upon this review. As pointed out by Mr. Justice Frankfurter in the **Toucey** case, the exception of the "res cases", which has become imbedded in the anti-injunction statute, has its roots in the same policy from which sprang the anti-injunction statute itself.

from the positive provisions of the congressional enactments.[12]

Moreover, the Lower Court's injunction is not justified as being "in aid of its jurisdiction".

The 1948 Reviser's Note under 28 U. S. C. 2283 declares the purpose of that phrase as follows:

> "The phrase 'in aid of its jurisdiction' was added to conform to section 1651 of this title and to make clear the recognized power of federal courts to stay proceedings in State cases removed to the district courts."[13]

The *Richman* case itself, especially in view of the vigorous dissenting opinion, precludes respondents from using the quoted phrase to support the injunction here, for as pointed out in the dissenting opinion in the *Richman* case, 28 U. S. C. 1337 generally vested the District Court with jurisdiction of the union's cause of action. But even if we were to take the narrowest view of the prevailing opinion in *Richman*, that the District Court had no jurisdiction of the union's complaint and that, therefore,

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[12] Nothing to the contrary was held in **Bowles v. Willingham**, 321 U. S. 503, 510, 88 L. Ed. 892; **Porter v. Lee**, 328 U. S. 246, 90 L. Ed. 1199; **Porter v. Dicken**, 328 U. S. 252, 255, 90 L. Ed. 1203; and **Fleming v. Rhodes**, 331 U. S. 100, 108, 91 L. Ed. 1368, as in each of these cases the Court determined that Congress had created a special exception to the anti-injunction statute. Some of the language in **Capital Service v. N. L. R. B.**, 347 U. S. 501, 98 L. Ed. 887, which cites with approval, and apparently follows, **Bowles v. Willingham, supra**, is now of doubtful validity in view of the Court's considered pronouncement in the **Richman** case.

[13] See **Nongard v. Burlington County Bridge Com'n.**, 229 F. (2d) 622, 625 (C. A., 3rd, 1956), following the **Richman** case and expressly relying on the Reviser's Note.

"such non-existent jurisdiction cannot be aided", respondents would be no better off. For the present case would fit even into that narrow category. By virtue of the previously pending *in rem* State Court suit the Court below was "disabled from exercising any power"[14] over the *res* and the Louisiana State Court proceeding. Such disabled jurisdiction cannot be aided.

Further it would not do to say, as the Government's brief in opposition seems to suggest, that 28 U. S. C. 1345[15] entitles the Government to circumvent Section 2283. Although Section 1345 confers jurisdiction generally on the district courts where the United States is plaintiff, the same can be said of ordinary diversity jurisdiction under 28 U. S. C. 1332. The pertinent language of Sections 1345 and 1332[16] is identical, and it would amount to an absurd negation of the anti-injunction statute if the general jurisdiction statutes were allowed to supersede Section 2283 under the pretext that injunctive relief was needed to "aid" such general—and otherwise existing—jurisdiction.

The rationale of some of the earlier decisions which sought to justify intercalating in the anti-injunction statute an exception in favor of the Government is based on a

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[14] **Toucey v. New York Life Ins. Co., 314 U. S. 118, 136.**

[15] **"Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress. June 25, 1948, c. 646, 62 Stat. 933."**

[16] **"(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $3,000 exclusive of interest and costs, and is between:**
"(1) Citizens of different states; * * *."

false premise. The first of such decisions which started this unwarranted departure from the injunction act was ~~cision in the case bear repeating: Petitioner, an un-~~ *United State v. Inaba*, 291 Fed. 416 (E. D. Wash., (1923). There it was reasoned that if the United States were not allowed an injunction it would force the Government indirectly to subject itself to suit in the State Court in violation of the Government's sovereign immunity. But it is clear, and as we shall point out in a subsequent portion of this brief, the United States even without specific congressional authority can be and frequently is made a party plaintiff in a State Court suit where without diminution of its sovereign dignity it can assert and often has asserted its claims.[17]

This Court's decision in *United States v. United Mine Workers of America*, 330 U. S. 258, 91 L. Ed. 884 (1947), is not authority for the injunction in the present matter. In this widely publicized case there was involved the validity of the contempt proceedings brought by the

[17] This faulty reasoning in **United States v. Inaba** and other lower court cases to the same effect is pointed out in the comprehensive article from the Yale Law Journal already cited, Taylor and Willis, **The Power of Federal Courts to Enjoin Proceedings in State Courts**, 42 Yale L. J. 1169, 1192 (1933). The article further mentions that the decisions involving the United States as plaintiff constitutes "the most recent exception made to the injunction statute, and one which has not yet received the sanction of the Supreme Court, * * *." The dictum of Mr. Justice Miller in **United States v. Lee**, 106 U. S. 196, 222, 27 L. Ed. 171, is certainly no such sanction, particularly when Mr. Justice Miller was merely making a suggestion in the nature of a prophecy which would take place **after** the ejectment action in **United States v. Lee** had been terminated.

And see **United States v. Parkhurst-Davis Mercantile Co.**, 176 U. S. 317, 320 (1900), for an instance where the prohibition against injunctions was specifically applied to the Government, although it must be conceded that the short opinion of Mr. Justice Brewer is rather unsatisfactory and the decision itself was sought to be distinguished in the **Inaba** case, 291 Fed. 416, 417.

United States against the United Mine Workers for disobedience of the injunction issued by the Court below. It was vigorously contended on appeal by the Mine Workers Union that the Clayton and the Norris-LaGuardia Acts prohibiting the Federal Courts from issuing injunctions in cases "between an employer and employees" stripped the lower court of the power to issue the injunction which was the basis of the contempt order. Although the leading opinion[18] adverted preliminarily (330 U. S. 272, 273) to the "old and well known rule that statutes which in general terms divest pre-existing rights or privileges will not be applied to the sovereign without express words to that effect", the subsequent portions of the opinion by Mr. Chief Justice Vinson (330 U. S. 273-276) demonstrate that the majority view was really based on the fact that the express terms of the Norris-LaGuardia Act necessarily excluded the United States from its operation. It is seriously to be doubted whether a majority of the Court in the *United Mine Workers* case concurred in even the preliminary observations by the Chief Justice. Four of the members of the Court[19] all unequivocally declared that despite the language of the federal enactments referred to, the prohibition against the issuance of injunctions by federal courts in the Norris-LaGuardia Act was applicable to the United States. And the two remaining members[20] of the Court who dissented on other grounds from the holding of the majority only briefly concurred, without further

[18] Written by Mr. Chief Justice Vinson, and joined by Mr. Justice Reed and Mr. Justice Burton.

[19] Mr. Justice Frankfurter, Mr. Justice Jackson, Mr. Justice Murphy and Mr. Justice Rutledge.

[20] Mr. Justice Black and Mr. Justice Douglas.

explanation, on the point that the federal acts did not bar the Government from obtaining the injunction it sought.

No comfort on this phase of the case can be derived by respondents from the injunction which the Court granted June 11, 1956 at the request of the United States staying proceedings in a Louisiana State Court in connection with the tidelands litigation, United States v. Louisiana, No. 15, Original. In the tidelands litigation Your Honors' stay order of June 11, 1956, was issued to protect its *previously acquired in rem* jurisdiction, which is recognized as the sole "judicial" exception imbedded in the anti-injunction law. In fact, the motion of the United States, and the supporting brief for the injunction last June in *United States v. Louisiana* took pains to point out (pages 11 and 12, brief in support of Government's motion for an injunction) that "this is not the kind of case which can be carried on in two courts at once, as is possible with certain purely *in personam* actions".

The policy which led to the original enactment of the anti-injunction statute and which has continued to support its regular re-enactment is especially appropriate in cases where the United States as plaintiff seeks to enjoin State Court proceedings. For in such a case the unseemly conflict of jurisdiction with its resulting friction is accentuated by the additional circumstance that it is at the demand of the general sovereign itself that the function of the Court of a coordinate sovereign is sought to be stifled.

It is submitted that although Section 2283 requires the dissolution of the injunction, it would incompletely resolve the problem. There would still remain the basic con-

flict of jurisdiction represented by the current pendency of the two *in rem* actions, which of necessity cannot proceed independently to a final decision in both State and Federal Courts.

We address ourselves to this fundamental question.

II.

THE PENDING AND PRESENTLY ENJOINED SUIT IN THE LOUISIANA STATE COURT IS AN IN REM, OR QUASI IN REM, ACTION, AND THE PRESENT SUIT WHICH WAS SUBSEQUENTLY FILED IN THE UNITED STATES DISTRICT COURT IS OF THE SAME NATURE. THEREFORE, THE PRESENT ACTION, WHICH WAS SUBSEQUENTLY FILED, MUST BE DISMISSED OR ABATED, OR, AT LEAST, STAYED.

Because of practical necessity, two *in rem* actions cannot proceed concurrently. Therefore, the rule has become firmly entrenched in decisional law that the Court which is subsequently resorted to for the purpose of securing a judgment for, or jurisdiction and control of, the same *res* is "disabled from exercising any power over it, by injunction or otherwise".[21]

This fundamental precept springs from the same root principle that gave birth to the anti-injunction statute itself. It would be idle to cite more decisions than are needed to exemplify the invoked rule and to demonstrate that it is fully applicable to the case at bar. In varying situations the following decisions have applied this rule of necessity. *Hagan v. Lucas*, 10 Pet. 400, 9 L. Ed. 470 (1836); *Orton v. Smith*, 18 How. 263, 15 L. Ed. 393, 395

[21] Toucey v. New York Life Ins. Co., 314 U. S. 118, 136.

(1856); *Taylor v. Carryl*, 20 How. 583, 15 L. Ed. 1028, 1031-1032 (1858); *Buck v. Colbath*, 3 Wall. 334, 18 L. Ed. 257 (1866); *Covell v. Heyman*, 111 U. S. 176, 28 L. Ed. 390, 392-393 (1884); *Byers v. McAuley*, 149 U. S. 608, 37 L. Ed. 867, 871 (1893); *Wabash R. Co. v. Adelbert College*, 208 U. S. 38, 52 L. Ed. 379, 386 (1908); *Palmer v. Texas*, 212 U. S. 118, 53 L. Ed. 435 (1909); *Lion Bonding & S. Co. v. Karatz*, 262 U. S. 77, 67 L. Ed. 871 (1923); *Penn General Casualty Co. v. Pennsylvania*, 294 U. S. 189, 79 L. Ed. 850 (1935); *United States v. Bank of New York & Trust Co.*, 296 U. S. 463, 80 L. Ed. 331 (1936); and *Toucey v. New York Life Ins. Co.*, 314 U. S. 118, 86 L. Ed. 100 (1941). The law of Louisiana is in accord with the Federal rule, *Ferriday v. Middlesex Banking Co.*, 118 La. 770, 43 So. 403 (1907).

In the present matter both the previously filed State Court action and the present Federal action qualify as *in rem*, or *quasi in rem*, actions. Indeed, little or no argument has been made by opposing counsel on this score, and the opinions of the Lower Courts both tacitly concede that the nature of the two pending actions is such as otherwise to make controlling here the invoked rule.[22]

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[22] The following authorities leave no doubt that the rule is applicable to the State Court petitory action and to this, the subsequently filed action in Federal Court to quiet the title of the Government to the same minerals: **Orton v. Smith**, 18 How. 263, 15 L. Ed. 393 (1856); **Covell v. Heyman**, 111 U. S. 176, 28 L. Ed. 390 (1884); **Heidritter v. Oil Cloth Company**, 112 U. S. 294, 28 L. Ed. 729 (1884); **Franz v. Franz**, 15 F. (2d) 797 (C. C. A., 8th, 1926); **Barnett v. Mayes**, 43 F. (2d) 521 (C. C. A., 10th, 1930); **Westfeldt v. North Carolina Mining Co.**, 166 Fed. 706 (C. C. A., 4th, 1909), (per Mr. Chief Justice Fuller sitting as Circuit Justice); and **Ferriday v. Middlesex Banking Co.**, 118 La. 770, 43 So. 403 (1907), (where the exact converse of the present situation existed—and where the Louisiana Supreme Court stayed further proceedings in the subsequently filed State Court **petitory** action by reason of the prior pendency of a **petitory** action in Federal Court).

Respondents have attempted to avoid the priority of jurisdiction rule by contending that it is not applicable in cases where the *res* is not actually *in custodia legis*. But it is well settled that it is no requirement of the applicability of this principle that the *res* be presently under seizure or is currently held *in custodia legis*. *United States v. Bank of New York & Trust Co., supra; Farmers' Loan & T. Co. v. Lake Street Elevated R. Co.*, 177 U. S. 51, 44 L. Ed. 667 (1900); *Lion Bonding & S. Co. v. Karatz*, 262 U. S. 77, 67 L. Ed. 871 (1923); *Princess Lida v. Thompson*, 305 U. S. 456, 83 L. Ed. 285 (1939). And see *Emil v. Hanley*, 130 F. (2d) 369, 370 (C. C. A., 2nd, 1942), where Circuit Judge Learned Hand accurately stated that "for priority between courts in point of jurisdiction depends, not upon the day when the property comes into their possession but upon that of the commencement of the first suit in which possession can be taken."

The priority of jurisdiction rule which petitioner invokes is fully applicable to the United States. Respondents do not challenge this proposition. Since this Court's decision in *United States v. Bank of New York & Trust Co.*, 296 U. S. 463, 80 L. Ed. 331 (1936), the question whether the rule of the *res* cases is applicable to the United States has not been open to argument.

The relevance of the *Bank of New York & Trust Co.* case and the vigorous attempts of respondents to distinguish it from the case at bar, justify a fuller statement of the facts of the case: The Russian Government had by decrees in 1917 and 1918 dissolved certain Russian insurance corporations which had substantial assets in the United States over and above creditors' claims. Liquida-

tion proceedings had been brought by the New York Superintendent of Insurance in 1925. Federal Court action was commenced by the Government in 1933 as assignee-owner of the entire amount of the assets, at which time the State liquidation in at least two[23] of the cases had been completed, and in at least one of the three cases the only State Court "suit" that was pending was an action by the Russian insurance company and its sole surviving director, claiming ownership or other appropriate disposition of the funds. The funds were not under seizure, or *in custodia legis*, in the State Court proceeding. Nevertheless, the United States was held not authorized subsequently to bring its "title" and injunction suit in the Federal Court to secure recognition of its ownership of and right to possession to the funds over which State Court litigation was already proceeding.[24] Said Mr. Chief Justice Hughes for the unanimous Court, 296 U. S. 463, 479:

> "The fact that the complainant is the United States does not justify a departure from the rule which would otherwise be applicable."

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[23] There were three separate actions which were consolidated for decision by this Court, one of which, the title case, involved the Bank of New York & Trust Company.

[24] In respondent's brief in opposition, as in the Courts below, a distinction is sought to be made between the **Bank of New York & Trust Co.** case and the case at bar, by reference to the fact that the Government's "title" claim in the cited case came into effect several years after the New York Court proceedings took place. In any event, this would be a distinction without a material difference, but reference to the Court of Appeals' decision in the **Bank of New York & Trust Co.** case, 77 F. (2d) 866, 868, 869, shows that that Court assumed as correct that the United States' title claim originated as of the date (1917 and 1918) that the Russian Government dissolved the Russian corporations, since by the 1933 act of assignment the United States merely stepped into the shoes of the Russian Government; and upon review here this assumption of fact was undisturbed.

The *Bank of New York & Trust Co.* case also dissipates the remaining contentions of respondents. One of the principal contentions that the Government has made in the present matter is that the Federal Court has "exclusive jurisdiction" of the title claim of the United States, and that for that reason the present and subsequently filed title suit must proceed and the Louisiana State Court action must be abated. This contention is in the very teeth of this Court's holding in the *Bank of New York & Trust Co.* case, where Your Honors declared in overruling the same argument there made by the Government that:

> "The Government insists that the United States is entitled to have its claim determined in its own courts. But the grant of jurisdiction to the District Court in suits brought by the United States does not purport to confer exclusive jurisdiction. It is a general rule that the grant of jurisdiction to one court does not, of itself, imply that the jurisdiction is to be exclusive."

The principle that the Federal Court does not have exclusive jurisdiction to determine the claims of the United States did not originate with the *Bank of New York & Trust Co.* case. The rule had long been the same and has been repeatedly applied, *Cotton v. United States*, 11 How. 229, 13 L. Ed. 675 (1850); *Robb v. Connolly*, 111 U. S. 624, 28 L. Ed. 542, 546 (1884); *Plaquemines Tropical Fruit Co. v. Henderson*, 170 U. S. 511, 42 L. Ed. 1126 (1898); *Merryweather v. United States*, 12 F. (2d) 407 (C. C. A., 9th, 1926); *People's Trust Co. v. United States*, 23 F. (2d) 381 (C. C. A., 1st, 1928); *United States v. Jacobs*, 100 F. Supp. 189 (N. D. Ala., S. D., 1951); cf., *Ames v. Kansas*, 111 U. S. 449, 28 L. Ed. 482 (1884).

As the Court long ago declared in *Cotton v. United States:*

> "Although as a sovereign the United States may not be sued, yet as a corporation or body politic they may bring suits to enforce contracts and protect their property, in the state courts, or in their own tribunals administering the same laws. As an owner of property in almost every state of the Union, they have the same right to have it protected by the local laws that other persons have."

As we have already seen, the inherent power of the State Courts concurrently to adjudicate upon federal claims and federal jurisdiction only last year received strong reaffirmation in *Amalgamated C. W. of A. v. Richman Bros.*, 348 U. S. 511, 518, 99 L. Ed. 600. The Court was there considering the question whether 28 U. S. C. 2283 was applicable to a Federal Court complaint which alleged the utter want of jurisdiction of the State Court, and Your Honors said, in language that is strikingly appropriate here:

> "The assumption upon which the argument proceeds is that federal rights will not be adequately protected in the state courts, and the 'gap' complained of is impatience with the appellate process if state courts go wrong. But during more than half of our history Congress, in establishing the jurisdiction of the lower federal courts, in the main relied on the adequacy of the state judicial systems to enforce federal rights, subject to review by this Court. With limited exceptions, it was not until 1875 that the lower federal courts

were given general jurisdiction over federal questions. During that entire period, the vindication of federal rights depended upon the procedure which petitioner attacks as so grossly inadequate that it could not have been contemplated by Congress. The prohibition of § 2283 is but continuing evidence of confidence in the state courts, reinforced by a desire to avoid direct conflicts between state and federal courts."

Entwined with the Government's contention that the Federal Court has exclusive jurisdiction of the title claim by the United States—which is demonstrably without foundation—is the Government's reliance upon the principle of sovereign immunity. Cases[25] have been cited by the Government, and doubtless will be cited here, in an attempt to demonstrate that the immunity of the United States from suit is a justification for the present Federal Court proceeding and the injunction against the previously filed State Court action.

But this same contention was pressed upon the Court by the Government in the *Bank of New York & Trust Co.* case without avail.[26] In answering the Govern-

[25] **Stanley v. Schwalby**, 162 U. S. 255, 40 L. Ed. 960 (1896); **Minnesota v. United States**, 305 U. S. 382, 83 L. Ed. 235 (1939); **Carr v. United States**, 98 U. S. 433, 8 Otto 433, 25 L. Ed. 209 (1879); **United States v. Shaw**, 309 U. S. 495, 84 L. Ed. 888 (1940); **United States v. U. S. Fidelity Co.**, 309 U. S. 506, 84 L. Ed. 894 (1940); **Louisiana v. Garfield**, 211 U. S. 70, 53 L. Ed. 92 (1908); **Larson v. Domestic & Foreign Commerce Corp.**, 337 U. S. 682, 93 L. Ed. 1628 (1949); **Mine Safety Appliances Co. v. Forrestal**, 326 U. S. 371, 90 L. Ed. 140 (1945).

[26] The United States there cited among other decisions **United States v. Inaba**, 291 Fed. 416, and **Stanley v. Schwalby**, 162 U. S. 255, 40 L. Ed. 960.

ment's argument on this point Mr. Chief Justice Hughes said:

> "There is no merit in the suggestion that the United States, in presenting its claim in the state proceedings, would be compelled to take the position of a defendant,—being sued without its consent. In intervening for the presentation of its claim, the United States would be an actor—voluntarily asserting what it deemed to be its rights—and not a defendant. We cannot see that there would be impairment of any rights the United States may possess, or any sacrifice of its property dignity as a sovereign, if it prosecuted its claim in the appropriate forum where the funds are held."

Louisiana procedural law is in perfect harmony with this ruling in the *Bank of New York & Trust Co.* case. We have already quoted Article 392 of the Louisiana Code of Practice to show that in Louisiana an intervener is "considered as plaintiff"; and the latest decision of the Louisiana Supreme Court in *State, ex rel. Pope v. Bunkie Coca-Cola Bottling Co.*, 222 La. 603, 63 So. (2d) 13, 14 (1953), elucidates the rule as follows:

> "It follows that while an intervener is considered as plaintiff, insofar as he must follow the jurisdiction of the defendant, he is, nevertheless a plaintiff in intervention who fights for his own hand; that is, he does not lose his identity in that of the original plaintiff, neither does he lose such identity in that of the original defendants."

The United States has continued to complain that the Government is powerless to intervene in the pending

State Court action, and that short of authorization by Congress it could not so proceed. Of course this contention, as we have seen, runs afoul of the considered decision in the *Bank of New York & Trust Co.* case, and it further disregards express congressional sanction for such action. For if any congressional authority for taking the prescribed action in the State Court is needed, Title 5, U. S. C. 316 amply provides it, to-wit:

> "*Sect. 316. Interest of United States in pending suits.* The Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in any suit pending in any of the courts of the United States, or in the courts of any State, or to attend to any other interest of the United States."[27]

Wholly disregarding the right of the Government to intervene as plaintiff in the Louisiana Court proceeding, respondents assert that the State Court is without jurisdiction by reason of the absence of the United States in that litigation. But the absence of the United States as a party litigant in the New York State Courts was not considered an adequate reason for granting the Government's injunction in its subsequently filed Federal Court suit in the *Bank of New York & Trust Co.* case. See also

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[27] See also **New York v. New Jersey**, 256 U. S. 296, 308, 65 L. Ed. 937, 943 (1921); **Ponzi v. Fessenden**, 258 U. S. 254, 262, 66 L. Ed. 607, 612 (1922); **Merryweather v. United States**, 12 F. (2d) 407, 410 (C. C. A., 9th, 1926); and **United States v. Jacobs**, 100 F. Supp. 189 (N. D. Ala., S. D., 1951).

Hart v. United States, 207 F. (2d) 813 (C. A., 8th, 1953), where the same argument was unsuccessfully made by the Government.

It is and has been from the outset petitioner's position that the State Court, even in the absence of the United States as a party, was entitled to proceed in petitioner's suit, although, of course, in the absence of the United States any State Court decree rendered there would not have the effect of *res judicata* against the Government. State District Judge Bruce Nunez, prior to the time that he was stopped by the restraining order in this case, rightly held that he had jurisdiction of the State Court case (R. 145-149, and particularly cases cited R. 146).

Petitioner brought its petitory action in Plaquemines Parish against the lessees in possession of the immovable property. Under Louisiana Code of Practice Article 43, such an action "must be brought" against such persons. And where the lessor as in the present case is the sovereign, the Louisiana rule, crystallized in its Supreme Court decisions,[28] permits the plaintiff to proceed to judgment as against the lessees.

The Louisiana procedural rule is consistent with the basic reasoning in prior decisions of this Court. *United States v. Lee*, 106 U. S. 196, 27 L. Ed. 171 (1882); *Tindal v. Wesley*, 167 U. S. 204, 42 L. Ed. 137 (1897); and

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[28] **Dreux v. Kennedy**, 12 Rob. 489 (1846); **Richardson v. Liberty Oil Co.**, 143 La. 130, 78 So. 326 (writ of error dismissed, 250 U. S. 648, 63 L. Ed. 1188, 1919); and **State, ex rel. Brenner v. Noe**, 186 La. 102, 171 So. 708 (1936).

Land v. Dollar, 330 U. S. 731, 737, 91 L. Ed. 1209, 1215 (1947).[29]

In petitioner's reply brief in support of the petition for certiorari in the present case, there was brought to this Court's attention the Lower Court's decision in *Gulf Refining Company v. Price*, No. 15622 (C. A., 5th, Feb. 2, 1956), which on the present point was entirely inconsistent with the Court's decision in the present matter. In the *Gulf Refining* case the pertinent facts and issues were: Isaac R. Price, et al., claiming to be the owners of several hundred acres of oil property in Plaquemines Parish, Louisiana,[30] filed in the United States District Court for the Eastern District of Louisiana a *petitory action*[31] against Gulf Refining Company, the oil, gas and mineral lessee in possession of the property under lease from the State of Louisiana. The chief defense, or as the Court below expressed it, "the most serious issue", in the *Gulf Refining* case, was whether or not the State of Louisiana, Gulf's mineral lessor, was an indispensable party

[29] **Stanley v. Schwalby**, 162 U. S. 255, 40 L. Ed. 960 (1896), has been repeatedly cited by respondents as announcing a different rule, but an examination of **Stanley v. Schwalby** will show that to be incorrect. In the **Schwalby** case the United States, by reason of its immunity from suit, was ordered dismissed from the State Court action, but the Court remanded the case to the Texas State Court with instructions **to enter judgment on the merits** for the individual defendants who had been initially sued by the plaintiff—title claimants. These individual defendants who thereby secured a judgment on the merits were army officers in possession of the United States Military Reservation at San Antonio.

[30] By coincidence the property involved in the present matter is also located in Plaquemines Parish. There is no connection whatsoever, however, between the present litigation and the **Gulf Refining** case.

[31] This is precisely the same type of action which was filed by petitioner in the State Court, and which now stands temporarily enjoined.

to the petitory action brought by the Price group asserting title to the property. The Court in its February 2, 1956 opinion rejected Gulf's defense, and held that Isaac R. Price, et al., were entitled to proceed to judgment against Gulf to secure a decree recognizing the Price title as against the mineral lessee in possession under a mineral lease from the State of Louisiana. In doing so the Court below relied on the same authority[32] and the same reasons which were relied upon by petitioner in the now enjoined and pending State Court case, as will be seen by the opinion of State District Judge Bruce Nunez (R. 146) upholding his jurisdiction prior to the time petitioner was restrained from proceeding further in his Court.

Almost immediately after petitioner learned of the Lower Court's February 2, 1956, opinion in the *Gulf Refining* case, it was brought to Your Honors' attention by the reply or supplemental brief filed in support of the petition for certiorari. Thereafter, the Court below by order dated April 6, 1956, withdrew and set aside its February 2, 1956 opinion and handed down an entirely new decision which made no reference to the authorities or to

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[32] **Dreux, et al., v. Kennedy, et al.,** 12 Robinson (La. Reps.) 489, 504. This is the leading Louisiana case authorizing a petitory action to be filed and prosecuted against a person (such as a mineral lessee) holding under a lease or other color of right from the sovereign. It is noteworthy that in **Dreux v. Kennedy** that the alleged owner of the property—just as here— was the United States. There is obviously no distinction that can be drawn from the circumstance that in the **Gulf Refining** case the lessor-sovereign was the State of Louisiana, and that in the present case the United States is the lessor, and indeed the Court of Appeals in the **Gulf Refining** case rightly saw the problem as identical no matter which of the two sovereigns was involved.

the points at issue covered by its earlier decision, and decided the case on a different ground.[33]

Although insofar as the reported decision in the *Gulf Refining* case is concerned (232 F. (2d) 25), the earlier (February 2, 1956) decision of the Court below in the same case is publicly non-existent, it is respectfully submitted that the rationale of the unpublished opinion is still valid and supports the position of petitioner.[34]

Finally, respondents' argument regarding the lack of jurisdiction in the State Court proceeding is rebutted by the *Amalgamated C. W. of A. v. Richman Bros.* case, 348 U. S. 511 (1955).

Without repeating what was said there, and what we have heretofore noted, the fact that the complaint in Federal Court alleged the State Court was utterly without jurisdiction—which Your Honors assumed to be correct—was held to be no basis for the issuance of an injunction against the State Court proceeding. The reasoning of the Court in the *Richman* case is equally applicable to respondents' contention that the priority of jurisdiction rule must be jettisoned for alleged want of jurisdiction in the State Court. As Your Honors pointed out in the *Richman* case the Louisiana State Courts may be depended upon to give a right answer to the Government's claim of want

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[33] The substituted opinion was based on the factual proposition that no lessor-lessee relationship existed between the State of Louisiana and Gulf Refining Company.

[34] To eliminate undue length in the present brief, petitioner will omit attaching the February 2, 1956 opinion as an appendix. However, it appears **in extenso** as Appendix A to petitioner's reply or supplemental brief in support of the petition for certiorari on file in the present matter.

of jurisdiction, and, in any event, and if the respondents are not satisfied with the final State Court ruling, review may be obtained here,

Respondents have heretofore stressed the "irreparable damage" to which the Government and the mineral lessees are exposed by reason of a threatened ouster from the oil field which is here in controversy. This suggestion is more dramatic than practical. Should the decision in the State District Court go against the defendants (either with or without the Government's presence as an intervening plaintiff) possession of the *res* may remain undisturbed by the procedure of a suspensive appeal to the Louisiana Supreme Court (Louisiana Code of Practice, Arts. 575, 577). Should the State's highest Court still decide adversely to the respondents on the issue of possession, upon seeking review by this Court the status quo may of course still be maintained (Supreme Court Rules 18, 27, 51).

Before commencing the final argument of petitioner we pause briefly to emphasize the purpose of the rule of the *res* cases and the policy which underlies the rule. Perhaps nowhere has the delicate balance of power between the Federal and State Courts been better described than by Mr. Justice Matthews in *Covell v. Heyman*, 111 U. S. 176, 182; and it would be difficult better to define the duty of forbearance in such cases than did he, when he there said:

> "The forbearance which courts of co-ordinate jurisdiction, administered under a single system, exercise towards each other, whereby conflicts are avoided, by avoiding interference with the process

of each other, is a principle of comity with perhaps no higher sanction than the utility which comes from concord; but between State Courts and those of the United States, it is something more. It is a principle of right and of law and, therefore, of necessity. It leaves nothing to discretion or mere convenience. These courts do not belong to the same system, so far as their jurisdiction is concurrent; and although they co-exist in the same space, they are independent and have no common superior."

III.

IN ANY EVENT THE COURT SHOULD GRANT PETITIONER'S ALTERNATIVE MOTION TO STAY BASED ON THE "DOCTRINE OF ABSTENTION".[35]

No doctrine has become more firmly entrenched than that the Federal Courts will refrain from passing on questions of constitutionality of a State law unless such a determination is unavoidable; and, therefore, this Court has insisted that Federal Courts should not prematurely decide such questions of constitutionality.

Petitioner, in the alternative, has contended from the inception of this matter that the present Federal suit should be stayed until the final determination of the previously filed State Court suit for the reason, as stated by petitioner in its motion in the District Court (R. 25, 26), that "the said pending litigation in said State Court involves questions of State law which should be determined

[35] So termed by Mr. Justice Frankfurter in **Railroad Commission of Texas v. Pullman Co.**, 312 U. S. 496, 85 L. Ed. 971 (1941).

and decided by the State Courts, in that said determination will provide a binding rule of decision upon this Court, and further said State Court decision may render a decision of federal constitutional questions unnecessary."

Although petitioner urged this alternative proposition below, the Court of Appeals disregarded and did not even mention this point, which is supported by repeated decisions of this Court. *Railroad Commission of Texas v. Pullman Co.*, 312 U. S. 496, 498, 499, 85 L. Ed. 971 (1941); *Chicago v. Fieldcrest Dairies*, 316 U. S. 168, 171, 172, 86 L. Ed. 1355 (1942); *Spector Motor Service v. McLaughlin*, 323 U. S. 101, 89 L. Ed. 101 (1944); *Hillsborough Township v. Cromwell*, 326 U. S. 620, 628, 90 L. Ed. 358, 365 (1946); *Kennecott Copper Corp. v. State Tax Com.*, 327 U. S. 573, 579, 90 L. Ed. 862 (1946); *American Federation of Labor v. Watson*, 327 U. S. 582, 589, 596, 599, 90 L. Ed. 873 (1946); *Albertson v. Millard*, 345 U. S. 242, 244, 245, 97 L. Ed. 983 (1953); and *Arkansas v. Texas*, 346 U. S. 368, 371, 98 L. Ed. 80 (1953). And compare *Thompson v. Magnolia Petroleum Co.*, 309 U. S. 478, 484, 84 L. Ed. 876, 881 (1940).

Mr. Justice Frankfurter put it this way in *Spector Motor Service v. McLaughlin*, 323 U. S. 101, 105:

> "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality—here the distribution of the taxing power as between the State and the Nation—unless such adjudication is unavoidable. And so, as questions of federal constitutional power have become more and more intertwined with pre-

liminary doubts about local law, we have insisted that federal courts do not decide questions of constitutionality on the basis of preliminary guesses regarding local law."

And as Mr. Justice Douglas declared in *Hillsborough Township v. Cromwell* (326 U. S. 620, 628):

"We have held that where a federal constitutional question turns on the interpretation of local law and the local law is in doubt, the proper procedure is for the federal court to hold the case until a definite determination of the local law can be made by the State courts."

The District Judge in this case correctly said (R. 159), "the ownership of these mineral rights will turn on an interpretation of a state statute" of Louisiana. The statute in question, as we have already noted, is Act 315 of the Legislature of Louisiana for 1940 (Louisiana Revised Statutes 9:5806), the relevant part of which reads:

"Section 1. Be it enacted by the Legislature of Louisiana, That when land is acquired by conventional deed or contract, condemnation or expropriation proceedings by the United States of America, or any of its subdivisions or agencies, from any person, firm or corporation, and by the act of acquisition, verdict or judgment, oil, gas, and/or other minerals or royalties are reserved, or the land so acquired is by the act of acquisition conveyed subject to a prior sale or reservation of oil, gas and/or other minerals or royalties, still in force and effect, said rights so reserved or previously sold shall be imprescriptible."[38]

[38] This Act is printed in full, Appendix A, infra, p. 45.

This Louisiana Statute has been held to be generally retroactive by the Court of Appeals, Fifth Circuit, in *United States v. Nebo Oil Co.*, 190 F. (2d) 1003 (1951), affirming the decision of the District Court, 90 F. Supp. 73. The same general conclusion as to the retroactive nature of this Statute was reached by the Louisiana Supreme Court in *Whitney Bank of New Orleans v. Little Creek Oil Co.*, 212 La. 949, 33 So. (2d) 693 (1947). However, the Supreme Court of Louisiana has not yet rendered any decision (as it would be required to do in petitioner's pending and now enjoined State Court suit) in respect of a mineral reservation contained in a deed from a vendor directly to the United States, as is the situation on the merits in the present controversy; and such a substantial question of local law, involving as it does the legislatively avowed public policy of Louisiana[37] should require the Federal Court to refuse to entertain jurisdiction of such a question, rather than to make premature guesses at what the State decision ultimately may be.

The decision of State Judge Nunez in the presently enjoined State action, which is, of course, not presented for consideration or decision on the merits at this time,[38] was based upon his analysis of the language of the subject mineral reservation. Judge Nunez determined that the

[37] In **United States v. Nebo Oil Co.**, 90 F. Supp. 73, 100, construing the 1940 Louisiana Statute which is the foundation of petitioner's claim on the merits, District Judge Porterie stated: "Moreover, the Federal Government is the largest landowner in Louisiana, and the dedication of large tracts for public purposes, such as forests and game preserves, withdraws these lands from commerce. It would appear entirely reasonable under these circumstances for the Louisiana Legislature to do all in its power to preserve the mineral rights in its citizens."

[38] **United States v. Bank of New York & Trust Co.**, 296 U. S. 463, 481; **Land v. Dollar**, 330 U. S. 731, 739.

alleged conventional termination date of the mineral servitude, to-wit: April 1st, 1945, related only to the right of entry, and did not affect the mineral reservation[39] as a whole (R. 145, 158). Even if the question on the merits were to be debated upon the plane selected by opposing counsel (i. e., that the 1938 mineral reservation created a mineral servitude with a contractual termination date), there would still remain, among other problems, the important question of whether the 1940 Louisiana Statute would apply as well to a conventional period of limitation as it does to the statutory or codal limitation or prescription of ten years, as petitioner seriously contends. *Ray v. Liberty Industrial Life Ins. Co.*, (La. App., 1938), 180 So. 855. Cf., *Borup v. National Airlines*, 117 F. Supp. 475, 477 (D. C., N. Y., 1954).

In the Government's brief in opposition to the petition for certiorari in this case it was suggested in footnote 1 on page 8 that "There may also be constitutional questions in regard to the validity and effect of the Louisiana Statute." Petitioner acknowledges that it is entirely likely that substantial constitutional questions will arise if one of several definitive interpretations of the 1940 Act is placed upon that Statute. The most obvious constitutional question would arise if the Louisiana Supreme Court should hold that the Statute is applicable to the 1938 reservation by Leiter, and that the Statute has the effect of suspending all prescripion or limitation which otherwise

[39] The entire mineral reservation is quoted in Appendix B, Infra, p. 46. It will be observed that the opinion of the Court below (R. 178) in "summarizing" the provisions of the reservation mentions only the alleged "terminal date" April 1, 1945—which was only some six and a half years after the execution of the deed itself; and yet in three places the term of the reservation is stated to be ten years, which is the normal life of a mineral servitude in Louisiana without user.

would accrue against the mineral servitude which was reserved, whether such prescription or limitation be conventional or statutory. Respondents may be then expected to contend that such a construction of the Statute would impair the obligation of the 1938 contract.[40] Such a question would not, of course, arise if the State Court's decision were favorable to respondents; and such a question may not arise if, as was the decision of State Judge Nunez, the State Supreme Court's decision were to be based purely upon a construction of the terms of the contract itself.

The "doctrine of abstention", therefore, is particularly suitable to the present matter, where, upon the merits, the question of the controverted title to the mineral rights must be resolved primarily by an application of a Louisiana statute relating to real property. It will not do to say that the Government's title to the minerals involved in this controversy must be determined by some land law foreign to Louisiana, inasmuch as Congress has not acted (and it is questionable whether Congress could constitutionally have acted) on the title to the minerals in question. Mr. Justice Rutledge said for the Court in *United States v. Standard Oil Co.*, 332 U. S. 301, 91 L. Ed. 2067, 2072 (1947):

> "It is true, of course, that in many situations, and apart from any supposed influence of

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[40] In the State District Court in presenting their brief in support of their exceptions to dismiss petitioner's petitory action The California Company and Lobrano said: "Any endeavor to apply Act 315 of 1940 so as to strike down the provisions of the United States contract limiting the term of Leiter's servitude would be to go completely outside the pale of prescription, with which the Nebo Oil Company case was concerned; and would violate the provisions of the United States Constitution protecting vested rights and prohibiting the enactment of any law impairing the obligation of contracts."

> the Erie decision, rights, interests and legal relations of the United States are determined by application of state law, where Congress has not acted specifically. * * * The Government, for instance, may place itself in a position where its rights necessarily are determinable by state law, as when it purchases real estate from one whose title is invalid by that law in relation to another's claim."[41]

That this concept is not to be confused with, and must be distinguished from, the principle of sovereign immunity from suit is made clear by Mr. Justice Rutledge's footnote to the above quoted language, 332 U. S. 301, 309:

> "The problem of the Government's immunity to suit is different, of course, from that of the nature of the substantive rights it may acquire, for example, by the purchase of property as against claims of others for which there may or may not be available a legal remedy against it."

In answer, respondents have contented themselves with a bare reference to some language in *United States v. County of Allegheny*, 322 U. S. 174, 183, 88 L. Ed. 1209 (1944), to the effect that the validity and construction of contracts through which the Government is exercising its constitutional functions "present questions of federal law not controlled by the law of any State". This allusion, of course, does not meet the pith of petitioner's argument.

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[41] See also **Reconstruction Fin. Corp. v. United Distill. Corp.**, 229 F. (2d) 665, 667 (2nd Cir., 1956), in which the Court said, in regard to a federal corporation which invoked the jurisdiction of the Federal Court under 28 U. S. C. 1345, that: "On the other hand, the validity of a conveyance of a real property is a matter peculiarly within the area necessarily governed by state law."

For an authoritative decision of the Louisiana Supreme Court may render unnecessary a determination of the supremacy of the Federal or the State law. The correct rule in the present case is not the excerpt quoted from the *Allegheny County* case, but rather is the principle which was settled in 1877 in *United States v. Fox*, 94 U. S. 315, 24 L. Ed. 192, as follows:

> "The power of the State to regulate the tenure of real property within her limits, and the modes of its acquisition and transfer, and the rules of its descent, and the extent to which a testamentary disposition of it may be exercised by its owners, is undoubted. It is an established principle of law, everywhere recognized, arising from the necessity of the case, that the disposition of immovable property, whether by deed, descent or any other mode, is exclusively subject to the government within whose jurisdiction the property is situated."

United States v. Fox has been followed by the Court to the present time. *Hutchinson Investment Co. v. Caldwell*, 152 U. S. 65, 68, 38 L. Ed. 356 (1894); *United States v. Perkins*, 163 U. S. 625, 630, 41 L. Ed. 287 (1896); *Sunderland v. United States*, 266 U. S. 226, 232, 233, 69 L. Ed. 259 (1924); and *United States v. Burnison*, 339 U. S. 87, 95, 94 L. Ed. 675 (1950). In the *Burnison* case the Court expressly refused to overrule *United States v. Fox*, saying through Mr. Justice Reed that a California statute prohibiting the United States from receiving property in California by will was "justified by reason of the state's close relationship with its residents and their property. A state may by statute properly prefer itself in this way,

just as states have always preferred themselves in escheat."

The issue presented here stands in bold relief when considered with *Sunderland v. United States*, 266 U. S. 226, 233, 69 L. Ed. 259 (1924), which approved the rule of *United States v. Fox*. There a land claim by the United States on behalf of an Indian ward was recognized in the absence of a State Statute such as we have in the present case. However, the Court specifically recognized that a direct conflict between State and Federal law would have emerged had there been present an Oklahoma statute or rule of law in conflict with the Federal Government's laws protecting Indian lands in Oklahoma, saying:

> "The State of Oklahoma is not concerned, since there is no state statute, rule of law or policy, which has been called to our attention, to the contrary effect. If there were, or if the power of state taxation were involved, we should consider the question of supremacy of power; but no such question is presented by this record."

Different from the situation in the *Sunderland* case, a determination of this case on the merits will directly involve the 1940 Louisiana Statute upon which petitioner's title claim is based. Therefore there may well arise "the question of supremacy of power" referred to in the *Sunderland* case. But this question may never emerge if upon this review the Louisiana State Courts are unfettered.

No more striking example for the application of the doctrine of abstention than the case at bar could be presented. Petitioner's alternative motion for a stay of the Federal Court action should be granted.

CONCLUSION.

For the reasons stated it is respectfully submitted that the judgment of the Court below should be reversed.

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APPENDIX A.

ACT NO. 315

AN ACT

Providing that when land is acquired by conventional deed or contract, condemnation or expropriation proceedings by the United States of America, or any of its subdivisions or agencies, from any person, firm or corporation, and the act of acquisition, verdict or judgment contains a reservation of oil, gas and/or other minerals or royalties or provides that said land passes subject to a prior sale or reservation of oil, gas and/or other minerals or royalties, still extant, said rights so reserved or previously sold shall be imprescriptible; and repealing Acts 68 and 151 of 1938 and other laws, general or special, inconsistent herewith.

Section 1. Be it enacted by the Legislature of Louisiana, That when land is acquired by conventional deed or contract, condemnation or expropriation proceedings by the United States of America, or any of its subdivisions or agencies, from any person, firm or corporation, and by the act of acquisition, verdict or judgment, oil, gas, and/or other minerals or royalties are reserved, or the land so acquired is by the act of acquisition conveyed subject to a prior sale or reservation of oil, gas and/or other minerals or royalties, still in force and effect, said rights so reserved or previously sold shall be imprescriptible.

Section 2. That Act 68 and Act 151 of 1938 and all other laws or parts of laws, general or special, in conflict herewith are hereby repealed.

Approved by the Governor: July 20, 1940

APPENDIX B.

(The following is the full text of the mineral reservation in the deed from Thomas Leiter to the United States dated December 21, 1938, and which is in the printed record, pp. 81, 82):

The Vendor reserves from this sale the right to mine and remove, or to grant to others the right to mine and remove, all oil, gas and other valuable minerals which may be deposited in or under said lands, and to remove any oil, gas or other valuable minerals from the premises; the right to enter upon said lands at any time for the purpose of mining and removing said oil, gas and minerals, said right, subject to the conditions hereinafter set forth, to expire April 1, 1945, it being understood, however, that the vendors will pay to the United States of America, 5% of the gross proceeds received by them as royalties or otherwise from all oil or minerals so removed from in or under the aforedescribed lands, until such time as the vendors shall have paid to the United States of America, the sum of $25,000, being the purchase price paid by said United States of America for the aforedescribed properties.

Provided, that if at the termination *of the ten (10) year period of reservation*, it is found that such minerals, oil and gas are being operated and have been operated for an average of at least 50 days per year during the preceding three (3) year period to commercial advantage, then, and in that event, the said right to mine shall be extended for a further period of five (5) years, but that the right so extended shall be limited to an area of twenty-five acres of land around each well or mine producing, and

each well or mine being drilled or developed at time of first extension, to-wit: April 1, 1945.

Provided, that this said right to mine as previously stated shall be further extended from time to time for periods of five (5) years whenever operation during the preceding five (5) year period has been for an average of 50 days per year during this period, and

Provided that at the termination of *the ten (10) year period of reservation*, if not extended, or at the termination of any extended period in case the operation has not been carried on for the number of days stated, the right to mine shall terminate, and complete fee in the land become vested in the United States.

The reservation of the oil and mineral rights herein made *for the original period of ten (10) years* and for any extended period or periods in accordance with the above provisions shall not be affected by any subsequent conveyance of all or any of the aforementioned properties by the United States of America, but said mineral rights shall, subject to the conditions above set forth, remain vested in the vendors.